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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-103

JOHNSON MANUFACTURING COMPANY
OF LUBBOCK,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. MACK SWIGERT
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorney for Petitioner, Johnson Manufacturing Company of Lubbock

Of Counsel:
WALTER A. SUHRE, JR.
WILLIAM K. ENGEMAN
LAWRENCE J. BARTY

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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BRIEF FOR THE PETITIONER

Petitioner, Johnson Manufacturing Company of Lubbock, which is now a wholly owned subsidiary of Eagle-Picher Industries, Inc., prays that a Writ of Certiorari issue to review paragraph 1(d) of the order of the United States Court of Appeals for the Fifth Circuit entered in this case on April 14, 1975.

OPINION BELOW

The opinion of the Court of Appeals is unofficially reported in 88 LRRM 3553, and appears herein as Appendix A, at pages A1-A13.

JURISDICTION

The order of the Court of Appeals was entered on April 14, 1975. (Appendix A, *infra*, page A1) This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Was it unlawful for the Court below, as a remedy for civil contempt for violation of a bargaining order, to restrict the Petitioner in the nature and content of its collective bargaining proposals and to compel bargaining concessions to the Union?

STATUTES INVOLVED

Sections 8(a)(1) (29 U.S.C. §158(a)(1)), 8(a)(5) (29 U.S.C. §158(a)(5)), 8(d) (29 U.S.C. §158(d)), 10(a) (29 U.S.C. §160(a)), 10(b) (29 U.S.C. §160(b)), and 10(e) (29 U.S.C. §160(e)) of the National Labor Relations Act, as amended. The relevant statutory provisions are set forth in Appendix B, *infra*, pages A13-A16.

STATEMENT

The NLRB Proceedings.

At the time of the commission of the alleged unfair labor practices, the Petitioner, Johnson Manufacturing Company of Lubbock, was an independent corporation operating two factories at Lubbock, Texas, manufacturing heavy earth moving equipment. During the pendency of the proceedings before the Fifth Circuit, and subsequent to the commission of the unfair labor practices in question, the Petitioner was acquired by and became a wholly owned subsidiary of Eagle-Picher Industries, Inc. (hereinafter "Eagle-Picher"). Eagle-Picher had no connection of any kind with Petitioner before the acquisition date, and did not participate in the commission of any of Petitioner's unfair labor practices.

On August 5, 1965, Local 826, International Union of Operating Engineers, AFL-CIO, was certified by the NLRB as bargaining representative for the Petitioner's employees in the above plants. The Petitioner recognized the Union and commenced bargaining negotiations on October 11, 1965. A number of issues remain unsettled and no agreement has yet been arrived at.

On January 5, 1967, the National Labor Relations Board, in an unfair labor practice proceeding, concluded in an unreported decision that the Petitioner had refused to bargain with the Union in good faith in violation of Sections 8(a)(5) and (1) of the Act, and directed that the Petitioner "upon request bargain collectively with the Union named herein as the exclusive representative of all employees in the appropriate unit * * *." (Appendix C, *infra*, pages A17-A54)

The Court Proceedings.

On April 5, 1967, the United States Court of Appeals for the Fifth Circuit entered an unreported decree in Case No. 24,511, enforcing the above order of the National Labor Relations Board. (Appendix D, *infra*, pages A55-A58)

On August 9, 1968, the National Labor Relations Board applied to the Fifth Circuit to have the Petitioner adjudicated in civil contempt for claimed violation of the enforcement order of April 5, 1967. A Special Master ap-

pointed by the Court found no violation and recommended dismissal of the petition. On April 6, 1972, the Fifth Circuit approved in part and disapproved in part the report of the Master. The Court specifically found that:

> "* * * after our order of enforcement of the Board's order: (1) the company insisted on retaining unilateral and final control over periodic wage increases, employee qualifications, discipline and working rules, job assignments, working hours, wage levels, and other conditions of employment such as sick leave; (2) that the company insisted that any contract or agreement contain a clause reserving to management all rights that management did not give up specifically in the terms of the agreement; * * * (4) that any contracts contain a union relinquishment of the right to bargain over the resolution of employee grievances or to compel arbitration of disputes." (458 F. 2d, at 455-56)

On the basis of these findings, the Court adjudged the Petitioner in civil contempt of the Court decree of April 5, 1967, and directed the Petitioner, as a measure of purgation,

> "(b) Specifically, in the course of such bargaining negotiations, if requested, [to]
>
> (1) eliminate its continued and rigid insistence upon unilaterial, complete, and final control over all aspects of wage and working conditions, found by the Board to be unreasonable, and
>
> (2) eliminate its continued and rigid insistence upon Union relinquishment of statutory rights of effective participation in grievance negotiation and the settlement of labor disputes, and of effective

> representation in consideration of changes in working conditions by the Company during the course of Agreement." (458 F. 2d, at 456)

On October 5, 1972, the NLRB again applied to the Fifth Circuit for relief, alleging that the Petitioner had failed to comply with the Court's order of April 6, 1972, and was again in contempt of the Court. A Special Master was appointed, and on the basis of his report, the Court concluded that "respondent [the Petitioner herein] and its president are in flagrant contempt of the April 6, 1972 order of this court." (*NLRB* v. *Johnson Manufacturing Co.* (CA 5; 1975) ..... F. 2d ....., 88 LRRM 3553, at 3555) The Court said:

> "We have formulated an order based on the proposals of the master and board and in light of the objections of respondent. It is couched in terms to bring the contumacious conduct of respondent and its president to an end but with harsh penalties being delayed for a period deemed reasonable for the purposes of reflection and the time which will be involved in recantation." (At 3556)

In the course of its comprehensive order (annexed hereto as Appendix A), the Court then specified that the Petitioner and its President,

> "* * * shall purge themselves of such contempt by:
>
> "1. * * *
>
> (d) *ceasing and desisting from insisting on unilateral and final control over employee wage and working conditions, and other matters which are bargainable subjects;*" (88 LRRM at 3556; emphasis added)

The above quoted paragraph 1(d) is the only part of the order which we seek to have reviewed by this Court.

The Petitioner's Application for Rehearing was filed on May 8, 1975, asserting that the above quoted paragraph 1(d) was in conflict with the decisions of this Court in *NLRB* v. *American National Insurance Co.* (1952) 343 U.S. 395, 96 L.E. 1027, and *H. K. Porter Co., Inc.* v. *NLRB* (1970) 397 U.S. 99, 25 L.E. 2d 124, and also with other applicable decisions. The Petition for Rehearing was denied on June 3, 1975. (Appendix E, *infra*, page A59)

The jurisdiction of this Court to review the case on Petition for Certiorari rests upon 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

A. The decision below is in conflict with decisions of this Court.

Paragraph 1(d) of the order of April 14, 1975 constitutes an attempt by the Court below to sit in judgment upon and regulate the substantive terms of a collective bargaining agreement. Although couched in general negative terms, compliance with this order will compel the Petitioner to accede to Union demands that it withdraw its proposal for a "management clause" in the collective agreement being negotiated and include therein a grievance clause terminating in binding arbitration or in the alternative, preserving a right to strike at all stages of the grievance procedure and not just at the conclusion thereof. If paragraph 1(d) is allowed to stand, the Court below, under the guise of remedying civil contempt, will have done what the NLRB cannot do. The legislative history of the Act and its 1947 amendments conclusively demonstrate that Congress never intended that either the Board or the courts should judge what concessions an employer must make or the proposals and counterproposals

that he may or may not make. If the Court of Appeals can accomplish by indirection what the Board itself could not lawfully order, the scheme of the Act and the concept of free collective bargaining will be seriously impaired. The decision below collides frontally with oft declared national labor policy. Review by this Court, therefore, is urgently required.

In arriving at the decision below, both the Board and the Court passed upon the desirability of the substantive terms of the Petitioner's proposed management clause, grievance clause, and other contract proposals. The Petitioner had proposed a conventional "management clause." (Appendix F, *infra*, page A60) Also, the Petitioner proposed a grievance clause with a right to sue or strike, rather than arbitrate, as its terminal provision. (Appendix G, *infra*, page A60)

The NLRB Trial Examiner, in his Intermediate Report in the unfair labor practice case, stated that:

> "The overall effect of the insistence on the part of the Company on their management's rights clause would totally reserve to the Respondent the absolute right to discharge and discipline any employee for any infraction of the company rules, and without such actions being subject to the grievance procedure whatever that might be. Had the Union accepted the Company's management's rights proposal it would have forfeited or surrendered any say in the size of the working crews, in the schedule of work, in the assignment of work, in the selection of employees, and, likewise would have had no say in the determination of any working rules and regulations including discharge for violations of the same." (Appendix C, *infra*, page A32)

The NLRB Trial Examiner stated that:

> "* * * under the Respondent's proposal the Union could only strike after it had exhausted the steps in the grievance procedure, and without even any recourse to arbitration. The right to strike is certainly a poor substitute for the usual contractual procedures such as arbitration for the normal handling of employee problems." (Appendix C, *infra*, page A34)

He said that:

> "To include the Respondent's demands on management rights and the grievance procedure, and possibly others, would be such as to leave the Union better off and more effective without any contract. * * * It is no answer to say that the Respondent would have been willing to enter into a contract, if only the Union had accepted its terms. Nor is there any justification or defense whatsoever from the argument that the Respondents' law firm had signed other contracts with other employers containing similar and identical proposals insisted upon in the instant case." (Appendix C, *infra*, page A35)

The Court, in the first contempt proceeding, referred to portions of the Trial Examiner's Report quoted above and stated:

> "We enforced the Board's order [in the earlier enforcement order entered April 5, 1967] because these findings clearly demonstrated surface bargaining used as a cloak to conceal the employer's bad faith." (458 F. 2d, at 455)

The Court said the record shows that:

> "* * * after our order of enforcement of the Board's order: (1) the company insisted on retaining unilateral and final control over periodic wage increases, employee qualifications, discipline and working rules, job assignments, working hours, wage levels, and other conditions of employment such as sick leave; (2) that the company insisted that any contract or agreement contain a clause reserving to management all rights that management did not give up specifically in the terms of the agreement; * * * and (4) that any contracts contain a union relinquishment of the right to bargain over the resolution of employee grievances or to compel arbitration of disputes.

* * *

> "The post-order proposals and positions of the company precisely parallel the surface bargaining we condemned in our enforcement order." (*NLRB* v. *Johnson Manufacturing Co. of Lubbock, supra*, 458 F. 2d, at 455-56)

The Special Master's Report approved by the Court below, and on which the Court's instant order is based, likewise passed upon the desirability of the substantive terms of Petitioner's proposal. Failure to revise the management rights proposal was cited as a per se example of bad faith bargaining. The clause was cited as proof that the Petitioner "was still insisting upon unilateral control over virtually all aspects of wage and working conditions." The Special Master found that "the Company never in truth relinquished" its claimed "right to schedule work and the right to contract out work."

The Court itself said:

> "They were required to eliminate management's insistence upon unilateral control of all aspects of wage and working conditions which in turn meant union relinquishment of the statutory right to participate in

grievance negotiations and the settlement of labor disputes with respect to changes in working conditions. The master's report makes plain this direction has been ignored in material part." (88 LRRM at 3555)

The statute which the Board and the Court were purporting to enforce specifically states that the obligation to bargain created by Section 8 of the Act *"does not compel either party to agree to a proposal or require the making of a concession."* (29 U.S.C. 158(d), Appendix B, *infra*, pages A13-A14) It defines the duty to bargain collectively in good faith as being:

> "The mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." (29 U.S.C. §158(d); emphasis added)

In *NLRB* v. *American National Insurance Co.* (1952) 343 U.S. 395, 96 L.E. 1027, this Court, refusing to pass on the validity of an employer's proposed management clause much stronger in its terms than Petitioner's proposal, stated it is

> "* * * clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (96 L.E., at 1037)

The Court noted that:

> "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms

> of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board.
>
> * * *
>
> "Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as *per se* violations of the Act." (96 L.E., at 1039)

The Court stressed that:

> "The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." (96 L.E., at 1036)

The Court also specifically held that it is not an unfair labor practice for an employer to refuse to include an arbitration provision in a collective bargaining agreement.

Later, in *NLRB* v. *Insurance Agents' International Union, AFL-CIO* (1960) 361 U.S. 477, 4 L.E. 2d 454, the Court reviewed the legislative history of Section 8(d), stating:

> "Obviously there is tension between the principle that the parties need not contract on any specific

terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the 'good-faith' test arose from the belief that it was *forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice.* Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in *setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.*' * * * Since the Board was not viewed by Congress as an agency which should exercise its powers to *arbitrate the parties' substantive solutions* of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into §8(d) of the Taft-Hartley Act. * * *

* * *

"The same problems as to whether *positions taken at the bargaining table* violate the good-faith test continue to arise under the Act as amended. * * * But it remains clear that §8(d) was an attempt by Congress to *prevent the Board from controlling the settling of the terms of collective bargaining agreements.*" (361 U.S., at 486-87; emphasis added)

Subsequently, in *H. K. Porter Co., Inc.* v. *NLRB* (1970) 397 U.S. 99, 25 L.E. 2d 124, this Court held that even though an employer's refusal to agree to a check-off clause was based on a desire to frustrate agreement, and the employer had not bargained in good faith, the NLRB had no power to remedy the unfair labor practice by requiring

the employer to agree to check off the dues of workers. After reviewing legislative history, the Court stated that:

> "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. * * * But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, *become a party to the negotiations and impose its own views of a desirable settlement.* This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act." (397 U.S., at 103-04; emphasis added)

The Court noted that where the record,

> "* * * revealed repeated refusals by the employer to bargain in good faith on this issue, the Court of Appeals concluded that ordering agreement to the check-off clause 'may be the only means of assuring the Board, and the court, that [the employer] no longer harbors an illegal intent.' " (397 U.S., at 107)

The Court said that the Court below,

> "* * * relied extensively on the equally important policy of the act that workers' rights to collective bargaining are to be secured. In this case the Court apparently felt that the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most important demand. Perhaps the court, fearing that the parties might resort to economic combat, was also trying to maintain the industrial peace that the Act is designed

to further. But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. *But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.*" (397 U.S., at 108-09; emphasis added)

If the Board cannot lawfully regulate the type of management or grievance clause an employer can propose to a union, neither can a court. Under the Act, the United States Court of Appeals is only empowered to review and enforce Board orders. It is not empowered to invent remedies depriving an employer of a statutorily protected right. In *H. K. Porter Co., Inc., supra*, this Court stressed that it is not the job of either "the Board *or the courts*" to compel "submission to one side's demands" in collective bargaining. (Emphasis added)

B. There is a conflict among the Circuits.

In *Moore of Bedford* v. *NLRB* (CA 4; 1971) 451 F. 2d 406, cert. den. 405 U.S. 1074, an employer insisted, as a condition to entering into an agreement with the union, upon contract provisions which would grant it the uncontrolled right to fix rates of pay for piecework unilaterally,

and, at the same time, denying to employees the right to file grievances as to the rates of pay for piecework. The Board ordered the employer to cease and desist from insisting on the inclusion in an agreement of such a provision for unilateral and final control by the employer over wages. The Fourth Circuit refused to enforce the order. It stated:

> "In the context of these negotiations, the Board's order, while couched in general negative terms, actually requires the Company either to abandon its proposed contract provision and accept the old contract provision as interpreted by the arbitrator or to accept straight hourly wages for all employees. Even if the Company had actually refused to bargain realistically about wages, which it did not, we think that the Board's order would violate Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d) because, under the circumstances of this case, it actually required the Company to agree to a substantive contractual provision of a collective bargaining agreement. This the Board was without power to do." (At 410)

In *International Woodworkers of America, AFL-CIO* v. *NLRB* (CA D.C.; 1972) 458 F. 2d 852, an employer insisted on a management clause preserving considerably more "unilateral and final control" than that involved in the management clause which has been proposed by Petitioner. (458 F. 2d, at 857, fn. 7) Also, as in the instant case, the employer proposed "that any action taken by it" under the management clause "could be treated as a grievance which, after exhaustion of the grievance machinery, could be made the basis of a lawful strike", but not arbitration. (458 F. 2d, at 855-56) The Board found that the clause was a permissible employer demand. The union

appealed, and the Court of Appeals denied the Petition for Review. With reference to the right to fix working hours and the right to subcontract preserved to the employer in the management clause, the Court said:

> "These are, of course, mandatory bargaining subjects, but that does not mean that an employer may not seek in good faith bargaining to reserve them by agreement in a management rights clause. * * * The mere fact that a subject is an appropriate one for collective bargaining does not mean that the employer may not seek by agreement to reserve the matter to itself." (At 859)

Accord: *Peerless Distributing Co.* (1965) 144 NLRB No. 142, 54 LRRM 1285.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

J. MACK SWIGERT
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorney for Petitioner

Of Counsel:
WALTER A. SUHRE, JR.
WILLIAM K. ENGEMAN
LAWRENCE J. BARTY

APPENDIX

APPENDIX A

NLRB v. JOHNSON MFG. CO.

U.S. Court of Appeals,
Fifth Circuit (New Orleans)

NATIONAL LABOR RELATIONS BOARD v. JOHNSON MANUFACTURING COMPANY OF LUBBOCK, No. 24511, April 14, 1975

BELL, Circuit Judge:—On April 5, 1967 this court enforced an order of the National Labor Relations Board directing respondent to cease and desist from refusing to bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO, from threatening its employees with loss of jobs, and from otherwise interfering with the attempts of the union at collective bargaining. NLRB v. Johnson Manufacturing Company of Lubbock, No. 24,511, April 5, 1967 (unpublished).

On April 6, 1972, this court entered its order adjudging respondent in civil contempt for failing to comply with the April 5, 1967 order. NLRB v. Johnson Manufacturing Company of Lubbock, 5 Cir., 1972, 458 F.2d 453, 80 LRRM 2012. The thrust of the civil contempt adjudication was failure of respondent to bargain in good faith. We found that (1) respondent failed to negotiate with the union concerning employer evaluation standards for determining merit pay increases; (2) respondent insisted on unilateral control of all aspects of wage and working conditions; and (3) engaged in a process of surface bargaining condemned in the April 5, 1967 order.

Respondent was required to purge itself of civil contempt in the following terms:

"Further ordered that respondent, Johnson Manufacturing Company of Lubbock, as the Company and acting through its officers, agents, successors, and assigns, shall forthwith purge itself of such contempt by:

1. Ceasing and desisting from:

(a) refusing to bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO, hereinafter the Union, as the exclusive representative of all respondent's employees as set forth in the appropriate bargaining unit.

(b) violating in any other manner this Court's Order of April 5, 1967.

2. Taking the following affirmative action in purgation:

(1) Upon request, bargain collectively with the Union named herein, as the exclusive representative of the bargaining unit.

(b) Specifically, in the course of such bargaining negotiations, if requested.

(1) eliminate its continued and rigid insistence upon unilateral, complete, and final control over all aspects of wage and working conditions, found by the Board to be unreasonable, and

(2) eliminate its continued and rigid insistence upon relinquishment of statutory rights of effective participation in grievance negotiation and the settlement of labor disputes, and of effective representation in consideration of changes in working conditions by the Company during the course of Agreement.

* * *

Further ordered that the Company begin immediately, in connection with its merit wage adjustment plan, the specific evaluation of all employees making available to the Union these evaluations in substance and result, and promptly enter into good faith negotiations with the Union for a restructuring of the standards of employee evaluation used under the merit wage adjustment plan to the end that the union may be effective as the bargaining agent in the area of merit increases."

On October 5, 1972, the board was again before this court alleging that respondent had failed to comply with the April 6, 1972 order. The Company's president, Robert C. Johnson, Jr., and its personnel manager, R. G. Box, were named individually in the complaint. The board prayed for a writ of body attachment as to them until respondent complied with the order, together with the imposition of fines.

After requiring responses the matter was referred to a special master for the purpose of receiving evidence on issues presented and to report to the court. The matter is now before the court on the report of the master.

We have carefully considered the comprehensive report including the findings of fact and conclusions of law contained therein as well as the record made before the master. We find ample support in the record for the findings of fact and no error in the conclusions of law. In sum, we conclude that respondent and its president are in flagrant contempt of the April 6, 1972 order of this court.[1]

---

1. We are advised by the board that personnel director Box is no longer employed by respondent. We find it unnecessary for adjudication or remedial purposes to discuss his role in the contempt activity. The extent of his activity as an agent and employee of respondent in the contumacious conduct is discussed in detail in the master's report.

Respondent was directed by our orders in 1967 and 1972 to cease and desist from refusing to bargain in good faith. The master found that respondent and its president had nevertheless engaged in mere surface bargaining. The record makes this clear beyond peradventure.

They were required to eliminate management's insistence upon unilateral control of all aspects of wage and working conditions which in turn meant union relinquishment of the statutory right to participate in grievance negotiations and the settlement of labor disputes with respect to changes in working conditions. The master's report makes plain this direction has been ignored in material part.

In addition, respondent failed to comply with the April 6, 1972 order as that order was concerned with the administration of the company's merit wage adjustment plan. Respondent was required by the order to (1) make a specific evaluation of its employees; (2) make available to the union the evaluations in substance and result; and (3) promptly enter into good faith negotiations with the union for a restructuring of the standards of employee evaluations used under the merit wage adjustment plan. Instead, respondent through its counsel and Box, the personnel officer, backed and filled in a farcical manner with the end result of substantial evasion of the order.[2]

Some of respondent's employees engaged in a strike beginning August 10, 1972 because of the failure of respondent to bargain in good faith. This strike was clearly an unfair labor practice strike. However, on September 18, 1972, respondent granted wage increases restricted to

2. Reference is made to the report of the master for the specifics of this proscribed conduct. No useful purpose would be served by repeating it here where our focus must be on remedy.

nonstriking employees, under the guise of not being able to evaluate those employees on strike.

One employee, Viyer Salinas, was relegated to assembly line work from his easier test stand job after being elected a union committeeman and attending bargaining sessions. The master found Salinas' treatment to be punitive and retaliatory for Salinas' union activities. This finding is supported by substantial evidence.

The employees in question have been without the union representation which the law accords them since April 5, 1967. This has been made possible by a recalcitrant employer taking advantage of the delays which inhere in the processes of law and particularly in labor law. It may be said however, that although the law does move slowly, a day of judgment will eventually come. We affirm the master's recommendation that respondent and its president be adjudicated in civil contempt of this court. We thus turn to the remedy to be invoked in concluding this matter.

The master recommended a contempt adjudication and purgatory order in precise terms. At oral argument we directed the board to submit a proposed order. It varies in some degree from the recommendation of the master. We permitted and have received the response of new counsel, employed subsequent to oral argument by respondent.[3] We have also considered the remedies applied by this court in other civil contempt adjudications in labor cases. See NLRB v. Schill Steel Products, Inc., 5 Cir., 1973, 480 F.2d 586, 83 LRRM 2386, 2669; NLRB v. Crown Laundry & Dry

3. Oral argument was complicated to some extent by the fact that respondent's counsel was its chief negotiator and principal contact with the union, thus making it difficult for him to appear as an advocate when in reality he was a witness and appeared as a witness before the master.

Cleaners, Inc., 5 Cir., 1971, 437 F.2d 290, 76 LRRM 2336. Skyline Homes, Inc. v. NLRB, 5 Cir., 1967, 381 F.2d 706, 65 LRRM 3105. The make whole remedy for the union, employed in paragraph 15 of the Order, infra, is an extension of the remedy required in Schill, supra, within the context of the second civil contempt adjudication of the respondent. On the make whole remedy in a mere failure to bargain setting, cf. United Steelworkers of America, AFL-CIO v. NLRB, 5 Cir., 1974, 496 F.2d 1342, 1349-1353, 86 LRRM 2984; Food Store Emp. U., No. 347 Amal. Meat Cut. v. NLRB, 1973, 155 U.S.App. D.C. 101, 476 F.2d 546 550-554, 82 LRRM 2955.

We have formulated an order based on the proposals of the master and board and in light of the objections of respondent. It is couched in terms to bring the contumacious conduct of respondent and its president to an end but with harsh penalties being delayed for a period deemed reasonable for the purposes of reflection and the time which will be involved in recantation.

Order

The Court having on April 14, 1975 filed its opinion finding that Johnson Manufacturing Company of Lubbock and its president Robert C. Johnson, Jr., violated the judgment against the Company of April 5, 1967 and the civil contempt adjudication against the Company of April 6, 1972, it is

Ordered and adjudged that Johnson Manufacturing Company of Lubbock and its president Robert C. Johnson, Jr., are in civil contempt of said judgment and adjudication and, it is further ordered that the Company and Robert C. Johnson, Jr., shall purge themselves of such contempt by:

1. Complying in full with the said judgment of April 5, 1967 and adjudication of April 6, 1972 and not in any way by action or inaction commit, engage in, induce, encourage, permit or condone any violation of said judgment or adjudication. This includes:

(a) the obligation to make a specific evaluation of all employees in connection with the Company's merit wage adjustment plan;

(b) the obligation to make available to Local 826, International Union of Operating Engineers, AFL-CIO (hereafter "the Union"), in substance and result, the evaluations of all employees made in connection with its merit wage adjustment plan;

(c) the obligation to enter into good faith negotiations with the Union for a restructuring of the standards of employee evaluation used under the merit wage adjustment plan, to the end that the Union may be effective as the bargaining agent in the area of merit increases;

(d) ceasing and desisting from insisting on unilateral and final control over employee wage and working conditions, and other matters which are bargainable subjects;

(e) ceasing and desisting from making unilateral changes in employee wages, hours, and working conditions, and failing to bargain in good faith with the Union with respect thereto;

(f) ceasing and desisting from discriminating in regard to hire or tenure of employment, or any term of employment, of any employee because of his or her presence on the Union's bargaining committee or because of any other Union activity;

(g) ceasing and desisting from retaliation or reprisals of any kind or nature against any employee because of activity in connection with the Union.

2. Notifying the Union in writing within 20 days after the entry of this order that it recognizes the Union as the exclusive representative of its employees in the designated unit and thereupon proceeding with the officials of the Union to set an initial date within 30 days from the entry of this order upon which bargaining sessions will recommence and thereafter proceeding to bargain in reasonably consecutive sessions until full agreement or *bona fide* impasse is reached and if any understanding is reached, incorporating such understanding in a written agreement. The existence of a *bona fide* impasse must be decided by this Court and the failure to find such an impasse will be considered failure to bargain in good faith, resulting in the sanction of paragraph 16 below. In no event shall the Company refuse to meet with the Union at any reasonable time or withdraw recognition from the Union as such collective bargaining representative until further order of this Court.

Said bargaining sessions shall be attended by its president Robert C. Johnson, Jr., or his successor in office, and any other representative or representatives which the company may designate.

It having been represented to the court that John Edward Price, Esq., former counsel for respondent has retired from the active practice of law, he shall not be designated or appointed by the Company to act for it in any bargaining-representative capacity in its negotiations with the Union unless permitted by order of this court.

If the Union requests the attendance of a representative of the Federal Mediation and Conciliation Service at any one of the bargaining sessions, the Company shall acquiesce therein and shall not fail or refuse to attend any meeting because of the presence of such representative thereat.

3. Directing any individual or agent authorized by the Company to negotiate on its behalf to read this order and to signify in writing that he has read and understands it.

4. Forthwith making Viyer Salinas whole for loss of wages, if any, benefits or privileges as a result of the Company's reprisal against him, such amount, unless agreed upon by the parties, to be computed by the Board in a backpay proceeding, subject to further review by the Court.

5. Granting retroactively to all employees who went on strike August 10, 1972, or thereafter, other than those employees at the top of their grades, or probationary employees such per-hourly wage increase as will be in conformity with the hourly wage increases previously granted to non-striking employees, and make each of such employees whole for any loss of wages suffered as a result of not being granted the per-hourly wage increases which were granted to non-striking employees. Such amounts, unless agreed upon by the parties, shall be computed by the Board in a back-pay proceeding, subject to further review by the Court.

6. Preserving and upon request making available to the Board or its agents at such reasonable place or places as the Board's Regional Director may specify for examination, copying and reproducing all the payroll, personnel, production and other records necessary or useful to determine the backpay due to Salinas and the strikers or to verify compliance with any provision of this order.

7. Furnishing the Union with the data and information required by this Court's order of April 6, 1972, and with all other data and information necessary for the Union to be effective as the bargaining agent for the em-

ployees of respondent Johnson Manufacturing Company of Lubbock with respect to all aspects of wage and working conditions which are properly bargainable subjects, including the information as to employees described in paragraph 10 below. When request by the Union for such data is in writing, it shall be answered by the Company in like form; and the Company shall forthwith advise the Union whether it will furnish the data and when, or shall specify the reason or reasons it relies on for refusing or delaying the information beyond two weeks from the date of the request.

8. Upon request of the Union made within six months from the date hereof, immediately granting to the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted for a period of one year from the date of said request.

9. Upon request of the Union, affording it reasonable access to all non-work areas to communicate with employees in such area during non-work time. This is not intended to affect access to the plant to which the Union may be entitled by law during working time.

10. Upon request of the Union, immediately furnishing it with a list by name, address, job description, wage rate and date of hire of all the Company's employees since April 6, 1972 and maintaining the list in current status so long as the Union remains the exclusive bargaining representative for the employees in the designated unit.

11. Posting in conspicuous places in its plant, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, a copy of this adjudication, and, alongside, a Notice in the form provided by the Board, which shall state that the respondents have

been adjudicated in contempt of the Court's orders and that they will undertake to comply with all of the purgation ordered by the Court. Said Notice shall be signed by president Johnson or his successor in office and on behalf of the Company by another officer thereof, and said copies of the adjudication and Notice shall be maintained in clearly legible condition throughout such posting period and respondents shall assure that they are not altered, defaced, or covered by any other material.

12. Filing sworn reports signed by both the Company and Union representatives with the Clerk of this Court with copies thereof to the Regional Director of the Board's 16th Region every 15 days after the initial bargaining session showing in detail the nature and course of the bargaining in summary form and appending thereto any written communications between the Union and the Company with respect to such bargaining. If either party has exceptions to the joint summary, separate additional reports setting forth differences may be filed. If upon investigation and analysis of such transcriptions the Board shall be of the opinion that the Company is not bargaining in good faith, it shall submit a report and supporting brief to the Court and propose appropriate sanctions.

13. Mailing to the home of each employee in the bargaining unit a copy of this order and of the aforesaid Notice and providing the Board's Regional Director of the 16th Region with proof of such mailing.

14. Reimbursing the Board for its costs and expenses, including counsel fees and salaries incurred in the preparation and presentation of these proceedings before the Special Master and this Court. Said amounts, unless agreed to by the parties, shall be fixed by further order of the Court upon submission by the Board of a verified state-

ment of such costs and expenses. The Company is also directed to pay all Court costs, including all costs relative to the Special Master.

15. Reimbursing the Union for its expenses incurred by reason of the failure of the Company to comply with the adjudication of April 6, 1972. to wit: for salaries and expenses incurred by the union and bargaining committee members in attending bargaining sessions with the Company in connection with a collective bargaining agreement or merit wage increases since April 6, 1972, payments by the union to employees of Johnson Manufacturing Company who walked the picket line, and attorneys' fees and expenses. Said amounts, unless agreed upon by the parties, shall be computed by the Board as in a backpay proceeding, subject to further review by the Court.[4]

16. In order to assure compliance with the provisions of this order it is further ordered as follows:

(a) A fine of $50,000 is hereby imposed on the Company, provided, however, that if the Company presents to the Court within 60 days from the date hereof, satisfactory evidence of compliance with the terms of this order and thus purges itself of its contempt within said time, said fine shall be remitted.

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4. The type of expenses to be reimbursed are set out in the master's report as follows:

> ". . . monetary expenses for mileage driven to and from Big Spring, Texas, and Lubbock, Texas, by its Business Manager and Business Agents; the actual time spent by the Union's Business Manager and Business Agents on negotiations and circumstances surrounding the Respondents' conduct regarding this litigation; telephone expenses; meals and lodging for the Union's Business Manager and Business Agents; payment of money by the Union to the pickets that were walking the picket line during the year strike and attorneys fees."

We do not, of course, validate the amounts involved.

(b) The Court reserves jurisdiction to take other appropriate action against respondent employer, president Johnson and any officer or agent of the Company responsible for non-compliance with any of the provisions of this order.

It is so ordered.

APPENDIX B

Statutes Involved

Section 8(a)(1) and (5) of the Labor Management Relations Act of 1947 (29 U.S.C. 158(a)(1) and (5)), provide:

Section 8(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) (29 U.S.C. 158(d)), of the Labor Management Relations Act of 1947 provides in relevant part:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of

an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Section 10(a) (29 U.S.C. 160(a)) of the Labor Management Relations Act of 1947 provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.

Section 10(b) (29 U.S.C. 160(b)) of the Labor Management Relations Act of 1947 provides:

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member,

agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 10(e) (29 U.S.C. 160(e)) of the Labor Management Relations Act of 1947 provides:

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order, and shall file for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just

and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

APPENDIX C

[Dated 1/5/67]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 16-CA-2502, 16-CA-2576, 16-CA-2651

JOHNSON MANUFACTURING COMPANY
OF LUBBOCK

and

LOCAL 826, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Order

On August 2, 1966, Trial Examiner Phil Saunders issued his Decision in the above-entitled proceeding, finding that the Respondent has engaged in certain unfair labor practices, and recommending that it take specific action to remedy such unfair labor practices. On the same date, the cases were transferred to the Board.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Board hereby adopts the findings and conclusions of the Trial Examiner as contained in his Decision, and orders that Respondent, Johnson Manufacturing Company of Lubbock, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., January 5, 1967.

By direction of the Board:

/s/ George A. Leet
Associate Executive Secretary

[Dated 8/2/66]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case Nos. 16-CA-2502, 16-CA-2576, 16-CA-2651

JOHNSON MANUFACTURING COMPANY
OF LUBBOCK

and

LOCAL 826, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Norman Eckhardt, Esq., and *J. O. Dodson, Esq.*, for the General Counsel.

Frank Parker, and *D. S. Brazel*, appearing for the Charging Party.

John Edward Price, Esq., and *Norman Bennett, Esq.*, for the Respondent.

Before: *Phil Saunders*, Trial Examiner

Trial Examiner's Decision

Statement of the Case

Upon charges and amended charges filed by Local 826, International Union of Operating Engineers, AFL-CIO, herein the Union,[1] the General Counsel on April 26, 1966, issued a consolidated complaint alleging that Johnson Manufacturing Company of Lubbock, herein the Respon-

1. In Case No. 16-CA-2502 the original charge was filed by the Union on October 27, 1965, and in Case No. 16-CA-2576 the original and first amended charges were filed by the Union on January 19, 1966, and March 2, 1966, respectively. In Case No. 16-CA-2651 the original and first amended charges were filed by the Union on April 14, 1966, and April 22, 1966.

dent or the Company, violated Section 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended. A hearing was held before the undersigned in Lubbock, Texas, on May 10, 11, 12, and 13, 1966, and all parties were represented by counsel. Oral argument was waived, but briefs were filed by the General Counsel and the Respondent and the same have been given due considerations.

Findings of Fact

I. The business of Respondent

Respondent is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having two plants, both located in the city of Lubbock, Texas, at 1802 East Fiftieth Street, and 718 Twenty-eighth Street, herein referred to as the plants, where it is now, and has been at all times material herein, engaged in the manufacture of heavy equipment.

Respondent, during the past 12 months, which period is representative of all times material herein, in the course and conduct of its business operations at the plants, manufactured, sold and distributed equipment valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said plants directly to States of the United States other than the State of Texas. Respondent is an employer engaged in commerce within the meaning of the Section 2(6) and (7) of the Act, and I so find.

II. The labor organization involved

Local 826, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices

The consolidated complaint, as amended at the hearing, alleges that on or about November 11, 1965, the Company posted written notices which threatened its employees with strikes and loss of their job security; that the Company threatened employees by advising them that they had not received wage increases because of their union activity; that the Company negotiated with the Union in bad faith; that there were unilateral lay off of five employees; that the Company unilaterally increased and decreased weekly working hours; that there were unilateral wage increases without prior notice or consultation with the Union; that the Company failed and refused to furnish the Union with its employees' insurance plan and the names of employees granted wage increases; that the Company proposed and insisted on unrealistic and unreasonable contract proposals; that the Company unilaterally offered reinstatement to the five employees it had previously laid off, and that the Company discriminatorily withheld from John S. Birtciel a 15-cent per hour wage increase on or about March 17, 1966.

This record reveals that on June 17, 1965, a majority of production and maintenance employees in the Respondent's plants designated the Union as their representative for the purposes of collective bargaining in a Board-conducted election, and on August 5, 1965, the Union was certified by the Regional Director.

The first bargaining session between the Union and the Respondent took place on October 11, 1965. Chief spokesman and negotiator for the Union, D. A. Brazel, testified, that at this meeting the Union was given contract proposals by the Respondent and also given classification and job rate copies (General Counsel's Exhibit No. 15A). The parties then exchanged discussion on rates within the

classifications, with the Company explaining that employees started working at the lowest rate and then received a 5-cent hourly wage increase within 90 days until they reached the top of the grade. The Union's principal negotiator, Brazel, then referred the Company to the changes in weekly working hours since certification from 49 to 59 hours. The Company was also advised that at least two employees had been threatened with discharge because they had not worked the additional hours required by the change, and that before the working of additional hours had always been on a voluntary basis. The Union informed the Company that they agreed to the language in the preamble clause but not to various references contained therein. After discussions the Union then advised the Company that they could not agree to the management rights clause and suggested modifications. The parties then discussed wages and overtime and the Union agreed to accept the language in paragraph I of the Respondent's proposal, but informed the Company that further negotiations were necessary to get proper rates, and that the overtime work proposal should be set forth on a daily basis. The Union agreed with the Respondent's proposal on wage rates in reference to new jobs. The parties at this session also discussed holiday provisions, and the Union presented a counterproposal asking for regular pay on holidays and for the hours the employee would have worked.

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On November 9, 1965, the parties held their second negotiating session.[2] The Union informed the Company that there was no need for any further discussion on the preamble and recognition proposals as the Union had agreed to them. The parties then discussed the Respondent's management rights clause, and Brazel stated

2. On October 25, 1965, the Union submitted by mail a proposed contract to the Company (General Counsel's Exhibit No. 17-A).

for the Union that he could not agree to the Company making all the work rules contained therein, and that the safety rules were completely out of line. At this time the Company did not agree to modify any of its work rules. Brazel also told the Company that their grievance procedure proposal was unacceptable as all management decisions were final. Union security proposals, classification, and wage rates, vacations and holidays, protective clothing and ventilation, employee benefits, insurance costs, jury pay, work hours, clean-up periods, shift differentials, leave of absence, overtime, bulletin boards, sick leave, notices, and seniority proposals were also discussed at this meeting, but no agreements were reached.

The third negotiation session between the parties was held on the next day, November 10, 1965. The Company presented a counter-proposal on their grievance procedure, but this again was rejected by the Union because management's decisions were still final and without recourse to arbitration. The Union also contended that the first step in the procedure need not be in writing. The Company next presented a new holiday proposal and it provided for seven holidays, but the Union objected in that it only provided for pay on straight time and the union proposal called for time and a half for work actually performed. There was also some discussions at this third meeting on vacation pay under holidays—the Union objected to the fact that the company proposal provided that an employee would not be paid additional wages for a holiday that fell during his vacation and that an employee must have been regularly scheduled to work on that particular day in order to receive his wages. The Union also objected to the Respondent's proposal on their union leave-of-absence clause which merely provided for 3 days, and the Company agreed to a period of time not in excess of 10 working days. At this third meeting the Company made a

counter-proposal dealing with safety and health. The Union advised the Company that they would accept one of the Respondent's paragraphs on safety and health in lieu of paragraph D of the Union's proposal. The parties then went into a discussion on insurance, and the Union requested the matter contract between the Company and its insurance carrier. The Union also inquired about the distribution of dividends and as to what amounts of money the Company actually contributed to the insurance plan. The parties then had further discussions on management rights provisions after the Company had presented a new counter-proposal. The Company also wanted to negotiate some reasonable work rules, but the Union replied that they could not agree to any that did not include arbitration. The Union then submitted a substitute clause to the Respondent's counter-proposal on management rights. At this session the parties had further negotiations on proposals dealing with hours of work and report pay.

At the fourth negotiating session on November 11, 1965, the parties discussed the Union's sick leave proposal. The Union stated that the Respondent's proposals on sick leave were most unreasonable and the Company then replied that they were willing to consider a proposal that would allow some cost increase. The Union then modified their demands from 3 months to 60 days and the Company replied that they would consider this modification. Jury duty pay was then discussed and the Company made some concessions on this clause which the Union considered "better" than the previous proposal by the Company.[3] The Company then asked for the Union's proposal on severance pay—the Union was asking for a 5-cent increase in this respect. The Company next informed the Union

3. At this stage in the negotiations a Federal Mediator arrived, and at times assisted the parties in various aspects.

that it would accept the union proposal relating to notices and savings clause. The parties then went to the Union's proposal on security, and the Company stated that this proposal would restrict the right of management to contract out certain operations of the Company. The Company informed the Union that it would offer a new contract-out clause and the Company did so—(Respondent's Exhibit No. 55). The parties again talked about protective clothing and health and safety—the Company expressed the sentiments that the employees took better care of their equipment or tools if they bought such items themselves. In further discussions on employee benefits the Company agreed to keep in effect all benefit programs at the time of the Union's certification, and the Company agreed to use the Union's language and to change "status" to "benefits" management rights and on grievance procedures. The Union objected to the fact that the Company proposal on these subjects restricted the employees' right to strike, and on grievances the only recourse was to the courts. The Company replied that they were reluctant to arbitration recourses because of some of the decisions in this field by the Supreme Court. The Company objected to the Union's management rights counter-proposal because it did not "spell out" the rights of the Company. The Union also made some changes in their last grievance proposal. The parties next went on to talks involving job assignments and wages. The Company explained how the job rates and grades were established and discussions followed. The Union objected to the Respondent's position or proposals because an employee could be promoted to a higher grade and yet receive no increase in wages. The Union also asked for job descriptions and were assured such would be supplied. The Union also asked the Company many questions as to their merit increase wage plan, and the Company explained their procedures and reasons

on evaluations or reviews of the 5-cent per hour wage increase to employees generally made on a 3 months basis. The Company then informed the Union that it withdrew its previous restrictions on the right to strike and informed the Union that "they could strike at any time." The Company then gave the Union a printed copy of their job classifications and also gave the Union a copy of the Respondent's pay policies.

The last negotiating session between the parties took place on December 9, 1965. The Union was told that they would not receive the Respondent's master insurance plan, and that because of the expense there would be no job training program. The Company asked the Union for their concessions on economic proposal and the Union replied that it would be useless to present them. Following the last regular negotiating session, as aforestated, the Company then mailed a proposed contract to the Union on or about December 11, 1965.

This record shows that throughout 1965 and into 1966 the Company granted its employees 5-cent hourly wage increases on a more or less 3 months' interval (General Counsel's Exhibit Nos. 52 and 53). Brazel, and other witnesses for the General Counsel, testified, that the Union was given no prior notifications of any such wage increases granted since their certification. This record further shows that in January 1966, the Company laid off employees—Reynolds, Fanning, New, Meadows, and Roberts. Brazel and business agent for Local 826, Frank Parker, testified, that again the Union had received no prior notification. On February 7, 1966, the parties held a meeting in regard to these layoffs. The Company informed the Union on this occasion that these employees were laid off on departmental seniority due to lack of work and under the provisions of the Respondent's last proposal.

The Company in its brief states, in part, the following:

> The Respondent met with the Union upon request and discussed the Union's demands. After clarifying and understanding the demands it gave consideration to them. For each of the demands which Respondent rejected, Respondent supported the rejections by reasonable argument; and it made counter-proposals in an effort to reach a compromise between what was demanded and what it would agree to. When the Union voiced objections to Respondent's counter-proposals, adjustments were made in an effort to conform the proposals to the Union suggestion. Respondent made proposals which it felt were needed to protect its business and supported the proposals by reasonable argument. When it was apparent agreement could not be reached on these proposals, Respondent deleted all or parts of several of them in an effort to secure agreement.

The statutory duty to bargain collectively imposes the obligation to meet and "confer in good faith" with a view to the final negotiation and execution of an agreement. Section 8(d) of the Act. While neither party is obligated to yield to the demands of the other, nevertheless, as the Fourth Circuit has pointed out, "The bargaining required by the Act does not mean mere talk with the purpose of avoiding agreement," and ". . . is not satisfied by mere discussion of grievances with employees' representatives." *N.L.R.B.* v. *Darlington Veneer Co.*, 236 F. 2d 85, 88-89 (C.A. 4). As the Supreme Court said, in restating the principles which guide decision in cases involving good-faith bargaining, in *N.L.R.B.* v. *Insurance Agents' Union,* 361 U.S. 477, 485, "Collective bargaining . . . presupposes a desire to reach ultimate agreement to enter into a collective bar-

gaining contract." In the instant case we have alleged unlawful conduct and incidents both at and away from the bargaining table, and for a complete and full evaluation of this case all such conduct must be justly appraised by taking into account the totality of the Respondent's conduct.

The background evidence in this case, presented mainly through John Birtciel, shows that plant manager, Charlie Johnson, on or about June 11, 1965, only 5 or 6 days before the election, told employees that the Respondent's "whole" employee program would go into effect on June 15, 1965, and that wage increases and classifications would be effective on June 17, 1965. Birtciel further testified as to what was said at this meeting on or about June 11, 1965, as follows:

> Mr. Charlie Johnson more or less explained to us a program that the company was about to inaugurate out there in the plant, in that the employees would be reclassified, and would under certain circumstances, receive an increase at the time this program was inaugurated, and beyond the wage increase, there were several other fringe benefits included in this particular program. Mr. Johnson went on to tell us that they had definitely changed the schedule of holidays from six holidays per year to seven holidays per year, and that they were *changing* the company policy on payment for being off work while attending—having a doctor attend you while being injured on the job.

Birtciel also testified that a notice was posted by the Respondent between June 11 and 14, 1965, at the Respondent's 50th Street plant which remained posted for approximately 2 weeks thereafter, and which outlined the program which Plant Manager Johnson had previously explained to the employees at the aforesaid meeting. Such notice explained "some wage increases and classifications," and "had a classification program set up and outlined in this notice." "The effective date on everything in the notice, other than the wage increases themselves, was *June 15, 1965,*" Birtciel stated. The General Counsel contends that the notice, mainly Company Exhibits 90A through 90I, indicates that the Respondent's 90-day progressive wage increase plan was far from automatic, and whether or not the increases were granted was a matter within the sole discretion of the Company. Further, that the notice was an inadequate one insofar as the Union was concerned because it failed to specify whether any one employee would receive any particular raise at any particular time in the future. The Company contends that before the Union was the certified bargaining agent, and in fact before it was in the picture at all, Respondent contracted for an outside consultant to formulate and establish a wage policy. That this work was begun by the management consulting firm in January 1965, and the plan was adopted in June 1965, in the normal course of events. Further, that ever since its establishment Respondent has followed that policy, and all wage changes have been made within that policy, and that there was no change so it could not be unilateral. The General Counsel points out in his brief that although the Company granted unlawful benefits and made promises a few days before the June 17, 1965, election—no allegations were made in the instant case concerning this conduct because of a settlement agreement and notice in Case No. 16-CA-2369, and approved by the Board's Regional Director on September 30, 1965. The General Counsel asks that I take official notice of the aforementioned settlement agreement, and the fact that a notice was posted by the Company from October 4, 1965, through December 3, 1965, as further background to shed

light on Respondent's bargaining state of mind, and to show that even during the period of the settlement notice the Company was contemporaneously bargaining in bad faith. As further background the General Counsel also cites the testimony of Birtciel as to what the Respondent's Attorney Price told employees in a speech on or about June 14, 1965. Attorney Price also testified as to what he stated on this occasion or occasions. Since the General Counsel stated several times at the hearing that the speech or speeches by Attorney Price were merely for background purposes, and testimony was only received for such purposes—I will not give any independent or controlling weight to the same. The Board has a well-established principle that background evidence is admissible to explain only ambiguous and equivocal conduct.

It appears to me that one of the first clues to the absence of a bona fide willingness on the part of the Company to bargain in good faith—is that throughout the course of the negotiations the Company was adamant in its refusal to give any worthwhile concessions relating to any increased cost or expense to the Company, as previously pointed out. It is also clear from this record that the Company even entered into the negotiating meetings with a predetermined decision to reject all proposals calling for any increased costs/or expenses. It is a well-established principle that a predetermined and fixed resolution to reject is not compatible with the term negotiate and no matter how long and how often the Company listened to opposing arguments and repeated its predetermined position. The parties merely reached agreements on proposals relating to the preamble, recognition, leave of absence, employment of relatives, protective clothing, report pay, notices, miscellaneous, and the saving clauses. There were some *partial* agreements in principle on certain paragraphs relating to new jobs, holidays, union repre-

sentation, working conditions (paragraph I), employee benefits, and possibly a few others. This is not to say or indicate that these proposals were at all acceptable to the Union, but merely that discussions took place and some very limited, partial, and preliminary agreements were eventually reached. It is readily noticeable that all the proposals agreed upon, and those agreed in principle or on a partial basis, contained no meaningful cost increase to the Company in any actual monetary outlay. There were no agreements reached on pay policies, wages, classifications, seniority, vacations, sick leave, contracting out work, and the grievance procedure. All these proposals, directly or indirectly, bear on possible increased costs and expenses to the Company, and without any concessions on such—coupled with the Respondent's announcements that its position were fixed on cost items—shows a definite unwillingness on the part of the Company to bargain in good faith.

It appears to me also that the Respondent's instance throughout the negotiations of unduly harsh and arbitrary contractual proposals is further evidence of an unwillingness to bargain in good faith. For instance, the Respondent's Management's Rights proposal, first submitted at the October 11, 1965, session, was as follows:

> Management's Rights: It is understood and agreed that the Company continues to exercise every legal power, right, and privilege which it had before signing this agreement unless specifically changed or abridged by the provisions of the agreement.
>
> Both the Company and the Union agree that it is the proper responsibility and the full and unlimited prerogative of the Company to manage its plant; to determine their schedules of work; to determine the size of the working force; to select and hire employees;

to assign work; to promote or demote employees; to direct the work of the employees; to determine the methods of work and the products to be produced; to make reasonable rules and regulations not inconsistent with this agreement; to administer discipline, including suspension or discharge for violation of such rules, or other proper or just cause.

The Company rules attached to the Respondent's management's rights clause contained 27 different violations which would be considered as grounds for discharge by the Company. The overall effect of the insistence on the part of the Company on their management's rights clause would totally reserve to the Respondent the absolute right to discharge and discipline any employee for any infraction of the company rules, and without such actions being subject to the grievance procedure whatever that might be. Had the Union accepted the Company's management's rights proposal it would have forfeited or surrendered any say in the size of the working crews, in the schedule of work, in the assignment of work, in the selection of employees, and, likewise would have had no say in the determination of any working rules and regulations including discharge for violations of the same. The Respondent's original grievance procedure provided that the decision of the plant manager or his representative would be final. Paragraph E and F of this proposal read as follows:

E. The decision of the plant manager, or his appointed representative, whichever the case may be, will be final and binding with respect to the issue; except that, after exhausting the steps provided for herein, if either party still feels that the provisions of this contract have not been fulfilled nothing herein shall deprive them from exercising any right, power, or privilege they may have under existing civil law,

provided that the right to strike shall be exercised only under the following conditions:

(1) Within five days from the date the plant manager, or his appointed representative, notifies the employee of his final decision, the Union will give the Company written notice of its intention to strike the Company, and

(2) Within not less than 30 days from the date such written notice provided immediately above in (1) is actually received by the Company nor more than 45 days after such written notice as provided in (1) is actually received by the Company, the Union shall actually commence such strike.

F. The parties recognize that each employee shall have the right to present any individual grievance without resorting to the grievance procedure provided herein. A representative of the Union may be present at any meeting held for the purpose of adjusting grievances.

At a subsequent bargaining session the Company consented to strike the provision requiring the Union to give the Company notice of its intention to strike. The General Counsel argues that the removal of the notice requirements and the Respondent's statement that the Union could strike at any time is contrary to the provisions in paragraph "E" of the Company's grievance procedure, as aforestated. It appears to me, as argued by the General Counsel, that the above proposals by the Company show that rather than seeking peaceful solutions of dispute—the Company was encouraging the Union to strike, and was actually asking the Union to forfeit its right to bargain for the employees while offering the Union nothing more than it already had. With no contract the Union's right

to strike would be almost unlimited while under the Respondent's proposal the Union could only strike after it had exhausted the steps in the grievance procedure, and without even any recourse to arbitration. The right to strike is certainly a poor substitute for the usual contractual procedures such as arbitration for the normal handling of employee problems. Additional testimony in this regard by Brazel also indicates that during the negotiations the Respondent was intent on provoking the Union to strike.

I agree with the General Counsel that throughout the course of bargaining the Company insisted on retaining unilateral control of matters which are traditionally bargainable subjects; that is, wages, hours, suspensions, disciplinary actions, discharges, and other conditions of employment, while at the same time insisting that the Union forfeit its primary defense to employer abuse of such control. Moreover, the Respondent's insistence that the Union give up its right to bargain about, or to arbitrate, labor disputes in return for an agreement which merely incorporated existing company practices, and merely providing the Union with the right to strike in protest of alleged violations of the contract during its term, was an unfair demand of the Union which had been certified to represent its employees. The Company was unwilling to offer any provisions which would give its employees or the Union anything more than they would have with no contract at all. As pointed out the Company insisted as a price for *any* contract, that its employees give up their statutory rights to be properly represented by a union and contemporaneously insisted that the Union's hands be tied in the effective processing and settling of employee grievances which could be expected to arise during its term.

In reality the negotiations show that the Company had a predetermined plan to yield nothing or very little of substance to the Union, and with likewise persistency to demand the inclusion of proposals which would have amounted to a negotiation and a surrender of the Union's right to effectively represent the employees. To include the Respondent's demands on management rights and the grievance procedure, and possibly others, would be such as to leave the Union better off and more effective without any contract. The Respondent's position in this phase of this case, and from which it never really varied in any material respect, does not in my view reflect the state of mind of an employer who approaches the bargaining table "with an open mind and purpose to reach agreement consistent with the respective rights of the parties." *L. L. Majure Transport Company* v. *N.L.R.B.*, 198 F. 2d 735, 739 (C.A. 5). It is no answer to say that the Respondent would have been willing to enter into a contract, if only the Union had accepted its terms. Nor is there any justification or defense whatsoever from the argument that the Respondents' law firm had signed other contracts with other employers containing similar and identical proposals insisted upon in the instant case. In my evaluation of this record I am permitted to take cognizance of the reasonableness of the positions taken by the Company, and in so doing it appears clear to me—in particularly these areas—that the Company was not negotiating with a genuine purpose to find common ground for agreement.

This record shows, as aforestated, that the Company set up a plan for wage increases before its bargaining duties materialized. It is apparent that the Company did not desire to bargain with the Union prior to each increase even though the negotiations were underway during most of the time when many of the increases became effective, as

previously noted herein. Furthermore, the timing of the Respondent's new wage and "whole" program for employees—a few days prior to the election—was such that most employees would have assumed that it was related to Respondent's hostility to the Union.[4] As has been noted during the period of the bargaining the Company offered no economic proposals above those granted unilaterally prior to and during the negotiations. The Respondent was merely willing to incorporate into their contract only the benefits which had previously been put into effect and no others. When the Union brought up a money item, the Company vetoed it giving no reason other than the fact that it was a cost item. Moreover, it also appears that the Respondent's wage proposal provided only rate ranges and not rates for the employees.[5] Therefore, the Company would be free to pay most any wages it wanted so long as they were within the rate ranges. The Respondent's defense to the wage increase is that they were the regular increases instituted according to its plan designed by the consulting firm, and in conformity with existing company policy. This argument by the Company is amply refuted by the testimony in this record. Brazel credibly testified that he was informed by the Respondent's attorney and spokesman, John Nelson, that employees would also have to qualify by merit in order to receive their periodic raises, and this was dependent on the evaluation of the employee's supervisor. Nelson further informed Brazel that 5-cents an hour increase would be granted every 3 months up to the top of the range "provided the man has made satisfactory

4. This was especially demonstrated on June 16, 1965, in the posting of a letter to all employees signed by the Respondent's president, R. C. Johnson, Jr.—see General Counsel's Exhibit No. 7. This letter stated in part, "Since the Company does not intend to give in to any unreasonable Union demands, you can expect a strike if the Union wins."

5. Appendix "B" of General Counsel's Exhibit No. 15A.

progress in learning to perform his job." In addition to the above Respondent's attorney, John Price, admitted in his testimony that wage rates are paid on "skill and ability, performance on the job, more than just automatic pay." Furthermore, evidence in the lack of regularity of Respondent's unilateral wage increases can be found in the inconsistent dates and amounts of the increases given (General Counsel's Exhibit Nos. 52 and 53). I agree that in view of these factors the Respondent's notice to the employees in June 1965 (General Counsel's Exhibit No. 22A) was inadequate to properly appraise the Union as to which employees would get raises and the amounts. The Court and Board law is clear that individual merit increases must be negotiated with the bargaining representative. In the instant case the Company admittedly had no definite formulated standards of automatic or predictable criteria for the granting of its merit increases, and as a result could not dispense with the need of bargaining on individual increases. There is no evidence that the Union ever waived its right to be consulted or notified on the increases, and in fact, the Union specifically requested such information. Likewise, it cannot be successfully argued on the basis of this record that there was any real impasse on wages between the parties during the bargaining sessions. In this respect it is noted that the Company had granted a number of wage increases even before the first bargaining meeting on October 11, 1905, and the testimony by Brazel shows that even by November 11, 1965, there had been no *real* bargaining on wages or classifications except in a "remotely related manner." In any event, the fact that the Respondent sent a proposed contract to the Union on or about December 11, 1965, as aforestated, would also tend to show a break of any alleged impasse that the Company might possibly contend had occurred.

It appears to me that another incident of the Respondent's bad faith in bargaining is found in the unilateral layoffs of Fanning, New, Meadows, Roberts, and Reynolds in January, 1966. This record shows that at the November 11, 1965, session—the Company took a final position on management rights and seniority—the two subjects directly related to the methods of selecting employees for layoff.[6] The Company admits that it bargained about these layoff; after they occurred (on February 7, 1966), but maintains that it felt no obligation to inform the Union about them as it was well known that Respondent was engaged in a "fluctuating business" in supplying Caterpillar Company with parts, and, therefore, the Union had been notified because seniority layoffs—depending on business from Caterpillar—were the normal and ordinary practice of the Company. From this record there is no evidence whatsoever that the Union had any actual or reliable information as to the normal operations of the Company regarding their lay-off practices. The Respondent's position is merely an assumption that some employee on the Union's bargaining committee was familiar with layoff procedures dependent upon customer demands, and that this assumption would be sufficient notification and consultation. Obviously, such conduct and assumptions do

6. As argued by the General Counsel the Respondent's management's rights clause gave it the *unlimited prerogative* to determine the size of the working force, and its other proposal, (Assignment to available Work-Seniority) dealt with the subject of selection of employees for assignment to work and did not cover layoffs. On the other hand, at the November 11, 1965, session, at which Respondent took several of its final positions, the Union negotiators were attempting to gain acceptance of their Seniority clause which did cover the subject of layoffs and recalls, and urged that such layoffs and recalls be based on "seniority and ability." The record in this case indicates that very little progress was made in either the November 11, or December 8 and 9, 1965, bargaining sessions primarily because Respondent's Attorney Nelson refused to discuss matters after he took his final positions.

not satisfy the requirements of the Act, and the subsequent bargaining session over the layoffs cannot rectify the former violative conduct of the Company. It is clear that the unilateral layoffs here in question were continued examples of the general intent on the part of the Company to sidestep its bargaining obligations.

An additional factor showing a lack of bargaining in good faith was the increase and reduction of hours by the Respondent without prior notification or consultation with the Union.[7] The Company argues as follows: "The scheduling of work both as to hours and as to the number of employees varies according to orders from Caterpillar in the normal and ordinary course of Respondent's business and is to be expected by all concerned as a part of that business. Respondent manufactures for only one customer, Caterpillar, at the 50th Street plant; and it is a way of business that these orders ebb and flow at the whim and caprice of Caterpillar, depending on business conditions beyond the knowledge or control of anyone not connected with Caterpillar. Neither Respondent nor the Union can do anything about it one way or the other. Both the employees and the Union know of these special business conditions."

As I have stated earlier herein this record fails to show any reliable information to the Union as to the normal operations of the Company. It is most obvious from the above that the Company could have no predesigned standards or predictable criteria for governing the hours of its

7. This record shows that the Company increased its regular existing weekly workweek on October 4, 1965, from 49 hours per week to 59 hours per week; decreased its regular existing workweek from 59 to 49 hours per week on November 1, 1965, from 49 to 45 hours per week; and increased its regular existing weekly workweek at its 50th Street plant from 45 to 49 hours per week on April 9, 1966.

employees as admittedly their hours of work depended on orders from another employer, and as a result the Company could not dispense with the need of bargaining on the same. Again there is evidence that the Union never waived its right to be consulted on working hours, and in fact, the Union continually requested negotiations on working hours.

The General Counsel also maintains—and this matter was fully litigated—that the Respondent's delay in complying with the Union's repeated requests for job classifications or descriptions constitutes an indicia showing bad faith in the bargaining obligation. General Counsel's Exhibit Nos. 8, 9, 10, 12, 13, and 15, dated in September and October 1965, show that the Union had requested such classifications, and Brazel made at least two or more oral requests at the bargaining sessions. At the December 8, 1965, session the Company gave the Union a printed copy of their job classifications. It is well-settled law that an employer's failure to furnish, upon the request of a bargaining agent, wage and personnel data directly pertinent and relevant to the bargaining agent's discharge of its duties as an employee representative supports an inference of a failure to bargain in good faith. From the above—and on the basis of this record as a whole—I find that the dilatory conduct of the Respondent in failing to supply job classifications until December 8, 1965, is another indicia of bad-faith bargaining. The Respondent's defense that the Union failed to press its demands for the job classifications cannot be supported by this record, and the contention that it was placed in the plant bulletin board does not satisfy the Respondent's bargaining obligation under the particular circumstances of this case. Moreover, it appears from this record that when the Company furnished the Union with job classifications at their first meeting, as

aforestated, it was fully aware that it also had in its possession "Job Classification" sheets (General Counsel's Exhibit No. 22A) which more fully explained the duties of each job classification. However, with full knowledge that such sheets were reasonably contemplated in the Union's above requests, and with full knowledge that such sheets, if shown to the Union, could reasonably be expected to facilitate a more meaningful discussion of a most important bargaining subject, Respondent, nevertheless, withheld such sheets until the Union insisted that they be brought to the bargaining table.

There is an allegation in the complaint to the effect that the Company failed to provide the Union with its employees' group insurance plan, and that such also shows bad-faith bargaining. As far as I can ascertain this record shows that at or about the third negotiation session the Company provided the Union with a booklet on its employees' insurance program, General Counsel's Exhibit No. 18A, and there is also in evidence General Counsel's Exhibit No. 22D—which is a most detailed contract between the Company and its insurance carrier. If these exhibits do not contain all the information actually needed by the Union for bargaining purposes it would indeed be difficult to determine what exact details were missing. The General Counsel has not sustained his burden of proof in this respect as the Company did furnish adequate documents, and I hereby dismiss the allegation.

The complaint, as amended at the hearing further alleges that the Respondent on March 10, 1966, unilaterally offered reinstatement to the five employees (Reynolds, Roberts, Fanning, New, and Meadows) laid off in January 1966, without consultation with the Union. The theory of the General Counsel is that the Union was never notified by the Respondent prior to the offers of reinstatement to

Reyonlds, Fanning, New, Meadows, and Roberts, on March 10, 1966, that such offers were made to these employees on an individual basis. As I have previously indicated herein the parties held a specific meeting on February 7, 1966, regarding these layoffs, and at this meeting the Union requested that these employees be returned to work. In view of this meeting prior to their reinstatements, I do not believe the General Counsel can be sustained in his argument that the Union was not notified. While the offers of reinstatement were on an individual basis it seems to me that the Company was merely following the wishes of the Union after the meeting in which the Union requested their return. The actual and admitted controversy between the parties, as stated by the General Counsel's own witness, Frank Parker, was that the Company had not bargained with the Union before these five employees were laid off, and I have found that *such* conduct showed bad faith. However, the allegation that the Company did not consult prior to reinstatement cannot be supported, and it is hereby dismissed.

There is also an additional amended allegation in the complaint which states as follows: "Although Respondent was requested by the Union by certified letter, dated April 13, 1966, directed to Respondent and its attorney, John B. Nelson, to meet on May 2, 1966, for a bargaining session, and to furnish the Union specific data respecting the Respondent's existing insurance plan, a list of all employees granted wage increases in September 15, 1965, December 15, 1965, and March 15, 1966, the effective dates thereof, and the amount of such increases, respectively, Respondent failed to meet with the Union on May 2, 1966, or to suggest an alternative date for meeting, and failed to furnish the aforesaid data to the Union, or advise the Union whether or not such data was in existence, or in its possession."

Union Representative C. E. Gressett testified that none of the information wage or personnel data requested in the Union's April 13, 1966, letter was ever furnished him or any other representative of the Union after such letter was forwarded to Attorney Nelson with a copy to the Respondent. Union Representative Parker testified that a copy of General Counsel's Exhibit No. 61 was forwarded by registered mail, return receipt requested, to Johnson Manufacturing Company and received a return receipt executed by Johnson Manufacturing Company on about April 15, 1966. This record shows that Attorney Nelson engaged in the practice of law in the law firm of Price and Nelson until March 31, 1966, at which time Nelson left the firm. The letter and envelope in question (General Counsel's Exhibit Nos. 61A and B) were addressed to John Nelson, but returned to the Union because of insufficient postage. Attorney John Price testified that this letter was handled in the normal manner—that is when his law firm receives any letter upon which postage is due they simply refuse to pay the postage and it is returned to the sender. The Respondent's defense therefore, is that they did not reply to the letter in question or supply any of the information asked for in the letter—because they did not receive it. Attorney Price also stated that he could not speculate on what the Company "thought" after receiving a copy of it, as aforestated. The General Counsel argues as follows: "Price's testimony concerning his refusal of the Union's certified letter of April 13, 1966, because it did not contain sufficient postage is deemed so preposterous as a defense to Respondent's obligation to bargain (in view of the fact that copy of GC-61 was sent to Johnson Manufacturing Company) as to be unworthy of belief and should be rejected by the Trial Examiner. In this connection it is noted that Johnson Manufacturing Company signed the receipt for the copy of which is GC-61A. Counsel submits that in

view of Price's involvement in the earlier bargaining between the parties, had he not deliberately desired to avoid opening the Union's letter (which was clearly marked *Local 826, International Union of Operating Engineers,* he would have willingly paid the 15¢ shortage in stamps. In this connection the Trial Examiner is requested to take official notice of Postal Bulletin 20519, March 3, 1966, page 5, promulgated on March 26, 1966, by the U. S. Post Office Department, which provides under paragraph 6 concerning certified mail that the proper postage for a letter of this type would have been *45¢* instead of *30¢* which was the amount on the letter." While the General Counsel's argument may have some merit there is, nevertheless, insufficient evidence in this record to support it. There is no evidence that Attorney Price ever saw the letter, there is no evidence that the Respondent's law firm varied in its procedures in the handling and returning of this letter from its normal manner, although the General Counsel repeatedly tried to show such in the cross-examination of Attorney Price, there is no evidence that any company official ever communicated with their law firm after receiving their copy of the letter in question, and from all business aspects the Company would not have done so since their law firm was vested with the full responsibility to handle the negotiation, and of course, the Company also had no knowledge whatsoever that the original letter had been returned to the Union because of insufficent postage. In accordance with the above, I also dismiss this allegation of the amended complaint.

On the basis of the issues being fully litigated at the hearing the General Counsel would further find bad-faith conduct on the part of the Company in that Attorney Nelson was consistently late in arriving at the negotiation meetings, and that the Company refused to comply with the Union's request that at least some management repre-

sentative with actual knowledge of the Company's operations be present at the bargaining sessions. After a careful review of the testimony I find that General Counsel's contentions in these respects to be without merit. With long distances between Fort Worth, the home office of the Respondent's lawyers, and Lubbock, where the negotiations took place, it is completely understandable why Attorney Nelson would be late on a few occasions for the bargaining sessions. The Company had also vested full responsibility in Price and Nelson for their negotiations, and there is no evidence that records and other information needed by Nelson were not at his command when and if he desired the same. Likewise, I find no merit in the General Counsel's contention and argument that employee Birtciel was unduly restricted or delayed in attending bargaining sessions.

The complaint alleges that the Respondent threatened its employees in violation of Section 8(a)(1) of the Act by posting a notice on November 11, 1965. The notice advised the employees in effect that they could expect a very long strike because the Company had "taken a final position on all issues not agreed upon," that if its employees struck "the Company will replace you and you can walk the picket line from now on as far as the Company is concerned," and stated that "the next move is up to the Union. While we do not know what they will do, we assume they will strike."[8] It appears to me that this notice by the Company unduly stressed and emphasized that the only course of action would be to strike, and in which event the Respondent would permanently replace the strikers. The Respondent's notice also reveals an implicit meaning that in future dealings with the Union the Company would not change its positions on any of the proposals not agreed

8. General Counsel's Exhibit No. 19.

to, and that, therefore, a strike would result. Thus, the notice, in reality contained but one theme—the inevitability of a strike, and the dire consequences of such a strike, namely, the loss of jobs by the strikers. Thus the notice was more than a prediction of future events under Section 8(c) of the Act. It constituted a threat by effectively arousing the employees' fears of losing their jobs if they went on strike—and by definitely indicating therein that a strike was the only recourse left open to the Union. Under the total aspects of this case the notice was reasonably calculated to create an atmosphere of futility and to discourage support for the Union among employees, and by such a message of futility, Respondent, interfered with, restrained, and coerced employees in the rights guaranteed in Section 7, thereby violating Section 8(a)(1) of the Act.[9]

The General Counsel further alleges an 8(a)(1) violation by J. C. McReynolds' threat on March 24, 1966, to employees Birtciel and Estrello that they had not received wage increases because they had engaged in union activities. At the time in question McReynolds was a registered owner of 500 shares of stock in the Company, had been active in the original formation of the Company, and at one time head of the acetylene generator operation in the plant. Birtciel testified that on the occasion in question McReynolds asked him what the Union had ever gotten for him, and after Birtciel had replied that he was receiving $2.30 an hour—McReynolds stated, "If you hadn't got tied up with the Union, you would be drawing $2.45 an hour, I know." Marcus Estrello testified that McReynolds told Birtciel, "Well, you could have been drawing $2.45 an hour." McReynolds admitted in his testimony making such a remark, but stated that he had reference to the

9. *Ideal Baking Company of Tennessee, Inc.*, 143 NLRB No. 14; *The Little Downtowner, Inc.*, 143 NLRB No. 96; *General Industries Electronics Co.*, 146 NLRB No. 115.

foreman's job on the night crew which Birtciel once held at $2.45 an hour. It is well settled by the Board and Courts that in determining whether an Employer's conduct amounts to interference, restraint, or coercion within the meaning of Section 8(a)(1), the test is not the employer's intent or motive, but whether the conduct is reasonably calculated, or tends to, interfere with the free exercise of the rights guaranteed by the Act. If the setting, the conditions, the methods or other probative context can be appraised, in reasonable probability, as having the effect of restraining or coercing the employees in the exercise of such rights, then his activity on the part of the employer is violative of this section of the Act. *N.L.R.B.* v. *Protein Blenders, Inc.*, 215 F. 2d 749, 750 (C.A. 9).[10]

The complaint alleges also an 8(a)(5) and 8(a)(3) violation by discriminatorily withholding a 15 cents per hour wage increase from John S. Birtciel—chairman of the employees' bargaining committee—on and after March 17, 1966. This record shows that Birtciel was hired as a welder at $1.65 per hour, and that he received several wage increases in 1962, 1963, 1964, and in 1965. Birtciel testified that the Company granted a general wage increase on March 17, 1966, but that he did not receive one and that he continued to be paid on the basis of $2.30 an hour. Birtciel then admitted that he did not know of any welder making more money than he was. This record shows that Birtciel was a class A welder and was being paid top wages as a class A welder, and that there are no provisions for higher wages in his particular classification. It appears that in order for Birtciel to receive

10. At the time in question McReynolds was an assembler in the plant and as such directed no employees. However, I am satisfied that his past associations with the Company, as aforestated, and the fact that he is presently one of the few stockholders which was well known around the plant—is sufficient in establishing that McReynolds was an agent of the Company.

$2.45 an hour he would have had to take a foreman's job in the welding department and which he had admittedly, been offered at one time. Birtciel further admitted that in December 1965, he received a wage increase from $2.25 to $2.30 per hour. Obviously there is a complete lack of any proof that Birtciel was denied a wage increase. He attained the top wage in his classification in December 1965, and at a time when he was generally active on the employees' bargaining committee. In accordance with the above the allegations in respect to Birtciel are hereby dismissed.

In conclusion, the conditions which the Company imposed on bargaining, including the unilateral wage increases, unilateral increase and reduction of hours, unilateral layoffs, the unreasonable position taken in several of its contract proposals, dilatory tactics in supplying available and meaningful job descriptions, refusal to accept increased cost on any of the main and important proposals, and threatening employees with loss of jobs, strikes and pay—are all evidence of the Respondent's bad faith. In view of all the foregoing, I find that the Respondent's failure and refusal to bargain in good faith with the Union after June 17, 1965, constituted a violation of Section 8(a)(5) and (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in Section III, above, which have been found to constitute unfair labor practices, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent engaged in unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has unlawfully refused to bargain with the Union as the representative of its employees in an appropriate unit, it will be recommended that Respondent, upon request, bargain with the Union, and in the event an understanding is reached, embody such understanding in a signed agreement.

Having found that the Respondent independently violated Section 8(a)(1) of the Act by threatening employees with loss of jobs, strikes, and pay, it will be further recommended that the Respondent cease and desist from this and any other like or related conduct.[11]

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since June 17, 1965, the Union has been the exclusive representative of all employees in the following

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11. Other than the unilateral aspects of the five layoffs in January 1966, there is insufficient evidence to find that these employees were discriminatorily selected for layoffs (there is no such allegation), and therefore, I reject the General Counsel's position that the remedy grant them backpay.

appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's Lubbock, Texas, plant, excluding all office clerical employees, technical and professional employees, guards, and supervisors as defined in the Act.

4. By refusing to bargain in good faith with the aforesaid labor organization as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By the commission of other independent acts of interference, restraint, and coercion of its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. All other allegations and issues litigated but not specifically found violative herein—are dismissed.

The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case, it is recommended that Johnson Manufacturing Company of Lubbock, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of all Respondent's employees as set forth in the appropriate bargaining unit described above.

(b) Threatening its employees with strikes, loss of jobs and pay because of their activities on behalf of the Union.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection; and to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union named herein as the exclusive representative of all employees in the appropriate unit as so described.

(b) Post at their plants in Lubbock, Texas, copies of the notice attached hereto and marked Appendix. Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, shall after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 days there-

after in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.[12]

(c) Notify the Regional Director for the Sixteenth Region, in writing, within 20 days from the date of the receipt of this Decision what steps they have taken to comply herewith.[13]

It is recommended that unless within 20 days from the date of the receipt of this Decision, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations the Board issue an Order requiring the Respondent to take the aforesaid action.

Dated at Washington, D.C. August 2, 1966.

/s/ Phil Saunders
Trial Examiner

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12. In the event these Recommendations are adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

13. In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with LOCAL 826, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, as the exclusive representative of the employees comprising the appropriate unit described below:

WE WILL NOT unlawfully threaten employees with loss of jobs, strikes, and pay because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL upon request, bargain collectively with the above-named union as the exclusive bargaining representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment:

All production and maintenance employees at the Employer's Lubbock, Texas, plants, excluding all office clerical employees, technical and professional

employees, guards, and supervisors as defined in the Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

Johnson Manufacturing Company
of Lubbock
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 8A24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102 (Tel. No. 334-2938, Ext. 2145).

APPENDIX D

[Filed 3/15/67]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,511

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JOHNSON MANUFACTURING COMPANY OF LUBBOCK,
Respondent.

Decree Enforcing an Order of the National Labor Relations Board

Before: GEWIN, GODBOLD and SIMPSON, Circuit Judges

This cause was submitted upon the petition of the National Labor Relations Board for summary entry of a Decree against Respondent herein, enforcing its order dated January 5, 1967. This Court has considered the entire transcript of record filed in this cause, and being fully advised in the premises, handed down its decision granting the petition and enforcing the said order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that Respondent Johnson Manufacturing Company of Lubbock, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO, hereinafter called the Union, as the exclusive representative of all Respondent's employees as set forth in the appropriate bargaining unit described in the Trial Examiner's Decision.

(b) Threatening its employees with strikes, loss of jobs and pay because of their activities on behalf of the Union.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all such activities.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union named herein as the exclusive representative of all employees in the appropriate unit as so described.

(b) Post at their plants in Lubbock, Texas, copies of the notice attached hereto and marked Appendix. Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, (Fort Worth, Texas), shall after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Decree what steps the Respondent has taken to comply herewith.

[CERTIFIED]
ENTERED: April 5, 1967.

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Decree of the United States Court of Appeals enforcing an Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with LOCAL 826, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, as the exclusive representative of the employees comprising the appropriate unit described below:

WE WILL NOT unlawfully threaten employees with loss of jobs, strikes, and pay because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL upon request, bargain collectively with the above-named union as the exclusive bargaining representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment:

All production and maintenance employees at the Employer's Lubbock, Texas, plants, excluding all office clerical employees, technical and professional employees, guards, and supervisors as defined in the Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

Johnson Manufacturing Company
of Lubbock
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 8A24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102 (Tel. No. 334-2938, Ext. 2145).

New Orleans, Louisiana

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24,511

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

JOHNSON MANUFACTURING COMPANY
OF LUBBOCK,
Respondent.

Application for Enforcement of an Order of
the National Labor Relations Board
Texas Case

On Petition for Rehearing and Petition for Rehearing En Banc (Opinion 4-14, 1975, 5 Cir., 1975, ... F.2d .....).

(June 3, 1975)

Before BELL, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX F

Management's Rights:

Among the rights retained by the company are the full and unlimited prerogative to manage the company's plant, to determine the schedule of work, to determine the size of the work force, the selection and hiring of employees, to assign work, to direct the work of the employees, to direct the methods of work, and products to be produced, to contract out its work, and to make reasonable rules and regulations not inconsistent with this Agreement, to administer discipline including suspension or discharge for violations of the company rules or for other just cause.

APPENDIX G

The decision of the plant manager, or his appointed representative, whichever the case may be, will be final and binding with respect to the issue; except that, after exhausting the steps provided for herein, if either party still feels that the provisions of this contract have not been fulfilled nothing herein shall deprive them from exercising any right, power, or privilege they may have under existing civil law, including the right to strike.

No. 75-103

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHNSON MANUFACTURING COMPANY OF LUBBOCK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN C. MILLER
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ELINOR HADLEY STILLMAN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-103

JOHNSON MANUFACTURING COMPANY OF LUBBOCK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 511 F.2d 153. The Special Master's report is not officially reported.[1]

JURISDICTION

The order of the court of appeals was entered on April 14, 1975 (Pet. App. A6-A13). A timely petition for rehearing and suggestion of rehearing *en banc* was denied on June 3, 1975 (Pet. App. A59). The petition for a writ of certiorari was filed on July 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]A copy of that report has been lodged with the Clerk.

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly ordered the company to comply with previous orders of the Board and of the court to bargain in good faith with the Union by, in part, ceasing to insist upon a contract clause giving it unilateral and final control of bargainable matters, including employee wages and working conditions.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. A13-A16.

STATEMENT

A. The Board's Order and the First Contempt Adjudication

On April 5, 1967, the Fifth Circuit enforced the Board's order (Pet. App. A17, A55-A57) requiring petitioner (the Company) to bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO (the Union). *National Labor Relations Board* v. *Johnson Manufacturing Co. of Lubbock,* No. 24,511 (unpublished) ("*Johnson I*"). The Board had found that the Company had engaged in surface bargaining with no intention of reaching an agreement with the Union. This conclusion was supported in part by the Company's insistence that it must unilaterally control all conditions of employment, coupled with its insistence that the Union could have no right to bargain over the resolution of employee grievances or to compel arbitration of disputes (Pet. App. A34-A35).

On April 6, 1972, pursuant to the Board's petition, the Fifth Circuit adjudged the Company in civil contempt of its decree. The court found that the "post-order proposals and positions of the company precisely parallel the surface bargaining we condemned in our enforcement order." *National Labor Relations Board* v. *Johnson Manufacturing Co. of Lubbock,* 458 F.2d 453, 456 ("*Johnson II*"). It ordered the Company, *inter alia,* to bargain in good faith with the Union, and, in the course of such good faith bargaining, to eliminate "its continued and rigid insistence upon unilateral, complete, and final control over all aspects of wage and working conditions, found by the Board to be unreasonable," and "its continued and rigid insistence upon Union relinquishment of statutory rights of effective participation in grievance negotiation and the settlement of labor disputes, and of effective representation in consideration of changes in working conditions by the Company during the course of Agreement" (*ibid.*).

B. The Second Contempt Adjudication

On April 14, 1975, pursuant to the Board's second petition, the court of appeals, adopting the findings and conclusions of its Special Master, held that the Company and its president "are in flagrant contempt of the April 6, 1972 order of this court" (Pet. App. A1, A3) ("*Johnson III*"). The court concluded that the Company had "ignored in material part" its prior directions "to eliminate management's insistence upon unilateral control of all aspects of wage and working conditions which in turn meant union relinquishment of the statutory right to participate in grievance negotiations and the settlement of labor disputes with respect to changes in working conditions" (*id.* at A4). The court ordered the Company and its president to comply in full with the earlier judgments, and specified that this included the obligation to cease and desist "from insisting on unilateral and final control over employee wage

and working conditions, and other matters which are bargainable subjects" (Pet. App. A7). The Company now seeks review of the latter provision of the order (paragraph 1 (d)).[2]

ARGUMENT

The order issued by the court of appeals is proper and is not in conflict with decisions of this Court or other circuits.

1. Petitioner contends that paragraph 1(d) of the order is contrary to *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, and *H.K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99, because it will "compel the Petitioner to accede to Union demands that it withdraw its proposal for a 'management clause' in the collective agreement being negotiated and include therein a grievance clause terminating in binding arbitration or in the alternative, preserving a right to strike at all stages of the grievance procedure and not just at the conclusion thereof" (Pet. 6). This contention misconceives both the holdings in those cases and the scope of paragraph 1(d).

In *American National Insurance Co.*, this Court concluded, the Board had held that the employer's "action in bargaining for inclusion of *any* [management functions] clause 'constituted, quite [apart from] Respondent's demonstrated bad faith, *per se* violations of Section 8(a)(5) and (1)' " (343 U.S. at 400; emphasis

[2]On July 9, 1975, Mr. Justice Powell denied the Company's application for a stay of that provision pending the filing and disposition of the present petition.

added). The Court held that this approach was contrary to Congress' intention that "[t]he duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether (*id.* at 409).[3] Since the court of appeals (also the Fifth Circuit) had found that "the evidence, viewed as a whole, [did] not show that [the employer had] refused to bargain in good faith by reason of its bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration," the Court held that management's insistence on a management functions clause did not support the Board's finding of an unlawfull refusal to bargain (*ibid.*).

Here, on the other hand, the Board and the court of appeals did not rely upon the Company's "mere" insistence on a management prerogative clause. The Board's original order was based on its finding that petitioner had, through numerous obstructive tactics, engaged in bad faith bargaining in violation of Section 8(a)(5) and (1) of the National Labor Relations Act; while this finding was predicated in part on petitioner's insistence upon a sweeping management rights clause, that insistence was "appraised by taking into account the to-

[3]The Court added that "[a]ny fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as *per se* violations of the Act" (343 U.S. at 409).

tality of [petitioner's] conduct" (Pet. App. A28). Similarly, in *Johnson II* and *III*, the court held that petitioner had continued to engage in "mere surface bargaining," and that part of this sham consisted of its continued insistence "upon unilateral control of all aspects of wage and working conditions which in turn meant union relinquishment of the statutory right to participate in grievance negotiations and the settlement of labor disputes with respect to changes in working conditions" (*Johnson III*, Pet App. A4). Nothing in *American National Insurance* precludes the Board from relying on an employer's adamant insistence on an unusually broad management prerogative clause[4] as one factor, among others, to support an inference that the employer had no intention of reaching an agreement and thus was not bargaining in good faith.[5]

Nor is paragraph 1(d) inconsistent with this Court's holding in *H.K. Porter, supra*, 397 U.S. at 102, that "the Board * * * is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement."[6] Paragraph 1(d), when read in the light of the court's opinion and its earlier decrees, does not compel petitioner to agree to any particular provision, or to forego insistence on any management prerogative clause whatever. It merely prohibits petitioner from demanding a clause so sweeping that, as a practical matter, the Union would be denied its statutory right to "meet * * * and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. 158(d). Cf. *National Labor Relations Board* v. *Katz*, 369 U.S. 736.

2. Petitioner's assertion (Pet. 14-16) that there is a conflict among the circuits on this question is inaccurate. *International Woodworkers of America, Local* 3-10 v. *National Labor Relations Board*, 458 F.2d 852, 857-858 (C.A. D.C.), merely upheld the Board's finding—which was in turn based on a review of the employer's total bargaining conduct and "its 30-year history of contractual relations with the Union"—that the employer had not demanded a management rights clause in bad faith so as to evade its bargaining obligation.[7] The court noted, how-

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[4]The clause in *American National Insurance* was limited to such matters as promotions, discipline, and work scheduling (343 U.S. at 397), and it was not coupled, as here, with the requirement that the union relinquish significant statutory bargaining rights respecting changes in working conditions.

[5]Only a few of the many instances of bad faith described by the Special Master in his 93-page report were specifically noted by the court in *Johnson III*. But, as the court's opinion alone indicates, the Company had failed to provide vital bargaining information to the Union, granted a discriminatory wage increase to employees who did not join a strike to protest the Company's bad faith bargaining, and imposed a retaliatory transfer on a member of the Union bargaining team (Pet. App. A4-A5).

[6]In *Porter*, the Board had ordered the employer to agree to such a clause as a remedy for the employer's refusal to bargain in good faith concerning a contract clause for the checkoff of union dues (397 U.S. at 102).

[7]Similarly, in *Peerless Distributing Co.*, 144 NLRB 1510, 1513, also cited by petitioner (Pet. 16), the Board held only that the company's "insistence, in good faith, on [a particular] subcontracting clause was not unlawful."

ever, that it had "no doubt that a union can be confronted with management rights proposals under bargaining circumstances which point unmistakably towards a company purpose to frustrate the achievement of a contract." *Id.* at 860.

Moore of Bedford, Inc. v. *National Labor Relations Board*, 451 F.2d 406 (C.A. 4), certiorari denied, 405 U.S. 1074, concerned a contract clause giving the employer unilateral control over piecework rates. The court of appeals found (*id.* at 409) that the proposal was not made in bad faith since "the Company never refused to negotiate the base rate" by which the piece rate floor was determined.[8] The court of appeals also noted (*id.* at 407, n.2) that there, unlike here, the "General Counsel conceded 'that in no other respect is there distinct evidence of anti-union animus or illegal conduct.' "

3. Even if petitioner is correct in its assertion that it is entitled to insist upon its management prerogative clause, its complaint comes too late. The Board's order was enforced in 1967, and petitioner's proper course, if it believed that it was entitled to act as it has, was to come to this Court then. It did not do so, but acted (as the court of appeals concluded in 1972) in defiance of the court's order. The court held that "[t]he post-order proposals and positions of the company precisely parallel the surface bargaining we condemned in our enforcement order" (*Johnson II, supra*, 458 F.2d at 456) and expressly ordered petitioner to "eliminate its continued and rigid insistence upon unilateral, complete, and final control over all aspects of wage and working

[8]The court's dictum (*id.* at 410) that the Board's order would have violated Section 8(d) of the Act, "[e]ven if the Company had actually refused to bargain realistically about wages," was predicated on its construction of the order as requiring agreement to a particular contractual provision. As noted above (pp. 5-7), the order here does not have this effect.

conditions" (*ibid.*). This portion of the 1972 contempt adjudication is identical in all material respects to paragraph 1(d) of the order of which petitioner now complains. Again petitioner had an opportunity to seek review in this Court; again petitioner, instead of complying or seeking review, stood in contempt. It is not without reason that the court of appeals called petitioner's conduct "flagrant" (Pet. App. A3).

This Court has held that, even when an injunction unconstitutionally abridges basic First Amendment freedoms, the proper course is to obey it and seek review, not to defy the order. *Walker* v. *City of Birmingham*, 388 U.S. 307. We submit that this salutary principle should apply to the enforcement of judicial decrees of the sort entered in *Johnson I* and *Johnson II*; petitioner should not have the option of disclaiming any obligation to comply with orders that have been outstanding for eight years and which have been only clarified—not created—by the most recent adjudication of contempt.

4. Finally, we note that paragraph 1(d) was imposed upon petitioner as a penalty for contempt of court, not as a remedy created by the Board to rectify an unfair labor practice. The courts, as part of their power to penalize a contemnor, should be able to impose strong and effective sanctions that will deter contempt, not just to "make whole" the victim of the contemnor's misdeeds. It follows that courts should be able to devise sanctions that may not be open to the Board in the first instance. Therefore, even if paragraph 1(d) would have been beyond the Board's authority, it was not outside the power of the court. Cf. Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 U. Chi. L. Rev. 255, 263-266 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ELINOR HADLEY STILLMAN,
Attorney,
National Labor Relations Board.

SEPTEMBER 1975.